ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Personal Communications Industry Association's	)	
Broadband Personal Communications Services	)	
Alliance's Petition for Forbearance for Broadband	)	
Personal Communications Services	)	
	)	WT Docket No. 98-100
Biennial Regulatory Review - Elimination	)	
or Streamlining of Unnecessary and Obsolete	)	
CMRS Regulations	)	
	)	
Forbearance from Applying Provisions of the	)	
Communications Act to Wireless	)	
Telecommunications Carriers	)	

OPPOSITION OF AMERICA ONE COMMUNICATIONS, INC.

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SUMMARY

The Commission should deny The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association's (the "PCIA") Petition for Reconsideration of the Commission's order and affirm its decision to retain its resale rule for broadband CMRS operators. As it did in its initial forbearance request, PCIA fails to establish any grounds for forbearance under Section 10 of the Communications Act of 1934, as amended.

In its decision, the Commission correctly concluded that current market conditions are not sufficient to ensure that consumers will continue to receive the benefits of resale. In its attempt to prove competitive conditions in the CMRS market, PCIA omits information relevant to the evidentiary value of the statistics cited in its petition. More importantly, PCIA fails to address whether the amount of competition in the marketplace is sufficient to warrant elimination of a requirement that promotes competition. PCIA also fails to acknowledge the contribution made by resellers.

Cognizant that it does not have a case on the merits, PCIA attacks the Commission's decision by mischaracterizing it as an expansion of regulation and requesting a type of automatic forbearance that is not allowed under Section 10. Contrary to PCIA's assertions, the standards established by the Commission will make it easier for future petitioners requesting forbearance to obtain relief. Carriers seeking forbearance need only satisfy these standards. PCIA objects to these standards because it recognizes that they are not met by current market conditions in the wireless industry.

Further, the Commission should decline to adopt PCIA's proposal that "automatic forbearance" occur in markets where four CMRS licensees are operational because the request is

contrary to the procedure required by Section 10 of the Act and contrary to reasoned agency decisionmaking. The Commission has never found that the number of a carriers in a given market is determinative as to whether there is adequate competition. Instead, the Commission has based a finding of competitive conditions upon an array of different factors and makes a determination based on the administrative record before it.

TABLE OF CONTENTS

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OPPOSITION OF AMERICA ONE COMMUNICATIONS, INC.

America One Communications, Inc. ("America One") hereby submits this opposition to The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association's (the "PCIA") Petition for Reconsideration of the Commission's order in the above-referenced proceeding.[1/] For the reasons described below, the Commission should affirm its decision to retain its resale rule for broadband CMRS operators.[2/] Further, the Commission should decline to adopt PCIA's proposal that "automatic forbearance" occur in markets where four CMRS licensees are operational.

[1/] Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Docket No. 98-100, FCC 98-134, rel. July 2, 1998 ("*PCIA Forbearance Order*").

[2/] *See* 47 C.F.R. 20.12(b) (requiring that a broadband CMRS provider permit unrestricted resale of its service).

I. INTRODUCTION

America One is a reseller of wireless services and reaches underserved markets through a direct marketing channel. As the Commission has recognized, resellers benefit the marketplace by providing service to unserved and underserved market segments.[3/] In contrast, as their most heavily-advertised service plans show, facilities-based service providers focus on high-volume customers by marketing plans that often require the purchase of an expensive phone and costly large-minute bundles. A significant number of customers either cannot afford these plans or have calling patterns that do not justify purchase of large-minute bundles. These customers face the false choice of a plan they cannot afford or does not meet their needs, and alternative plans that impose high per-minute rates.[4/]

Resellers, however, are providing the alternative services these customers seek. Because resellers purchase airtime at wholesale rates, they are able to create airtime packages not promoted by facilities-based carriers, including offering wireless services to low or moderate use customers at affordable rates. Their premier plans—unlike those of facilities-based carriers—generally do not require a minimum purchase of large-minute bundles. Resellers also promote flexible service offerings by allowing customers to choose from a wide variety of plans with different combinations of free minutes, free equipment and low monthly access fees. Moreover,

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[3/] *See PCIA Forbearance Order*, ¶ 35.

[4/] We anticipate that PCIA will cite a number of facilities-based carrier plans with higher per-minute rates but lower monthly access fees as examples of alternative plans. These plans, however, are not currently as heavily advertised as the large-minute bundle plans. Further, these plans generally carry a higher per-minute rate and costly equipment charges that are not affordable to underserved market segments.

resellers use alternative marketing techniques, such as direct mail, to market to potential new customers that up to now have been excluded from the wireless market. These marketing techniques, combined with the resellers' affordable rates and flexible service offerings, enable resellers to reach unserved and underserved market segments that facilities-based carriers have traditionally neglected in their pursuit of lucrative, high-volume users.

PCIA fails to present any new arguments that warrant reconsideration of the Commission's decision denying forbearance from the CMRS mandatory resale requirement. PCIA's Petition for Reconsideration merely restates the arguments raised in its initial Petition for Forbearance, which were rightfully rejected by the Commission. Cognizant that it does not have a case on the merits, PCIA attacks the Commission's decision by mischaracterizing it as an expansion of regulation and requesting a type of automatic forbearance that is not allowed under Section 10 of the Communications Act of 1934, as amended (the "Act"). The Commission's decision, however, was not an expansion of regulation; it merely clarified and established guidelines for future forbearance requests consistent with the requirements of the Administrative Procedure Act ("APA").[5/] Accordingly, the Commission should reject PCIA's petition and affirm its decision to retain the CMRS resale rule.

5/ U.S.C. § 500, *et. seq.*

II. PCIA FAILS TO CONSIDER THE RELATIONSHIP BETWEEN COMPETITION AND RESALE.

A. The Commission Correctly Concluded that Competitive Development of CMRS is not Complete.

In its *PCIA Forbearance Order*, the Commission concluded that competition in the CMRS market is not yet mature.[6/] Despite this conclusion, PCIA contends that the CMRS market is "highly competitive"[7/] by relying on a misleading characterization of facilities-based carrier service plans and offerings. For instance, PCIA does not consider high activation charges in its analysis of pricing plans. Nor does it mention that the facilities-based carriers' most-heavily advertised plans often require the purchase of minimum large-minute bundles that result in higher monthly bills for customers. Specifically, several facilities-based carriers focus their advertisement on plans with monthly access fees ranging from $59.99 (for 250 to 400 minutes) up to $159.00 for 1,600 minutes. Under these plans, a customer must purchase the required minimum minute bundle each month regardless of the customer's actual service usage. For customers who cannot afford to pay on the order of $100 per month—or over $1,000 a year—the seemingly "low" per-minute charges associated with these plans are beyond their reach.

[6/] *PCIA Forbearance Order*, ¶¶ 8, 36.

[7/] The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association, Petition for Reconsideration, WT Docket No. 98-100, filed Sep. 10, 1998, at 6 ("*PCIA Petition*"). Characterizing competition in the CMRS industry as "robust," PCIA emphasizes the *number* of carriers operating in 97 of the 100 largest Basic Trading Areas ("BTAs"). *Id.* at 6-7. The Commission cannot simply look to the number of carriers operating in the top 100 BTAs. *See, e.g.*, Motion of AT&T to Be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995) (considering factors other than the number of carriers in a market in deciding whether the interexchange market was competitive). As the Commission recognized in its *PCIA Forbearance Order*, in evaluating the level of competition, it is necessary to consider a number of conditions within a geographic market in addition to the number of competitors. *PCIA Forbearance Order*, ¶ 44 & n. 143.

Further, PCIA fails to address whether the *amount* of competition in the marketplace is sufficient to warrant elimination of a requirement that promotes competition.[8/] PCIA's reliance on the presence of PCS is misleading. For instance, PCIA suggests that the mere presence of a PCS operator providing service in a market drives down cellular rates.[9/] PCIA adds that PCS prices are lower than cellular prices.[10/] However, most C-block licensed PCS carriers have not built-out their networks, and a majority of C-block licenses are either subject to a reauction or mired in bankruptcy proceedings.[11/] In addition, the problems that C-block licensees have encountered with financing have further removed a potentially significant competitor from the field. The inability of C-block licensees to go forward is particularly harmful to competition because many of them, unlike cellular and A and B block licensees, had expressed strong interest in allowing resale. Thus, PCIA is touting a competitive benefit that simply does not exist and may not materialize for a long time to come. Further, some A and B block licensees are affiliated with incumbent local exchange carriers (LECs). While some of these carriers are supportive of resale, most incumbent LECs have a tradition of monopolistic behavior and opposition to resale. These traditions are often reflected in A and B block licensees' antagonistic

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8/ The question is not whether the prices for CMRS services are low but, rather, whether those prices are as low as they could be.

9/ *PCIA Petition* at 7.

10/ *Id.*

11/ Indeed, more than 90% of the C-block licensees have defaulted on their payments.

approach to resale.[12/] The Commission should give no weight to PCIA's allegations of competition based on the role played by PCS carriers.

Not surprisingly, the CMRS market is far from competitive. Real competition requires a large number of competitors within a given market segment. The interexchange service market is a case-in-point.[13/] Indeed, when AT&T was the predominant interexchange carrier and MCI and Sprint were its main competitors, the Commission declined to deregulate AT&T's services. Today, however, the interexchange service market has hundreds of carriers, many of whom are resellers, offering services on a competitive basis.[14/] Indeed, press reports regularly identify new entrants, building new networks and offering new technologies in these market segments.[15/] CMRS by contrast has no more than 2 or 3 carriers in most markets. Given the absence of real competition in the CMRS industry, the Commission should reject PCIA's claims.

12/ Wireless services increasingly compete with local wireline services. Incumbent LECs therefore have diminished incentive to develop vigorously a wireless market that may undermine their wireline monopoly.

13/ For instance, the Commission has determined that the interexchange telecommunications market is substantially competitive. *See, e.g.*, Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report & Order*, 11 FCC Rcd 20730, 20741-43 (1996); Motion of AT&T to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3278-3279, 3288 (1995) aff'd, 12 FCC Rcd 20787 (1997); Competition in the Interstate Interexchange Marketplace, *Report & Order*, 6 FCC Rcd 5880, 5887 (1991). *See also infra* n. 14 (citing a recent Commission report confirming the presence of over 600 long distance carriers in the domestic interexchange market).

14/ *See* Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, dated July 1998 (concluding that there are 621 long distance carriers operating throughout the United States and its territories).

15/ *See, e.g.,*Reinhardt Krause, *Will Telecom Firms Gain On Steady Diet of Fiber?*, INVESTOR'S BUSINESS DAILY, Mar. 3, 1998, at A8 (discussing the rush of several new companies such as Qwest International, Level 3 Communications and IXC Communications to build new fiber networks used to provide high-speed data and Internet services); David Rhode, *New Kids on the Long-Distance Block; Qwest, LXC and Williams Race to Erase National Capacity Shortage With Vast New Nets*, NETWORK WORLD, Jan. 12, 1998, at 8.

B. Existing CMRS Competition is Due, in Part, to the Success of the Resale Requirement.

PCIA questions the Commission's finding that "resale promotes the provision of service to unserved or underserved communities."[16/] As the Commission recognized in its *PCIA Forbearance Order,* facilities-based carriers focus on high usage customers, offering pricing and volume discounts only to larger customers.[17/] Unlike these carriers, resellers focus on low to moderate usage segments, such as residential and small business customers.[18/] Resellers are bringing benefits to low-volume consumers whose needs are not being met by facilities-based carriers. For these reasons, the Commission found that resale continues to play an important role in the development of telecommunications markets, including the CMRS market.[19/] This is as true today as it was when the Commission issued the *PCIA Forbearance Order* in July, and PCIA's renewed efforts to avoid resale requirements should be soundly rejected.

C. Premature Elimination of the Resale Rule Would Impair Competition in the CMRS Marketplace.

PCIA states that it is not opposed to resale *per se*, only to mandated resale.[20/] If PCIA is indeed not opposed to resale, the Commission must ask why PCIA seeks to eliminate prematurely the preexisting resale requirements. PCIA claims that the CMRS resale rule

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16/ *PCIA Petition* at 18.

17/ *See PCIA Forbearance Order*, ¶ 35.

18/ *Id.*

19/ *Id.*

20/ *PCIA Petition* at 17.

imposes "burdensome costs on affected carriers and consumers"; however, PCIA fails to identify or quantify any costs.[21] Moreover, as the Commission recognized in its *PCIA Forbearance Order*, the resale rule does not prevent a provider from recovering the costs incurred in providing a service.[22] The inescapable conclusion is that PCIA seeks forbearance to eliminate resale altogether.

The facilities-based carriers' own agreements support this conclusion. It is not uncommon to find agreements that contain language allowing termination upon sunset of the resale requirement or otherwise upon 60 or 90 days' notice. These contract provisions discourage investment in the market by resellers because a reseller is unlikely to invest in a business that may be eliminated upon sunset of the resale rule. This reluctance to invest in the resale market is further exacerbated by several facilities-based carriers' insistence upon a right of first refusal to acquire resellers' accounts upon the occurrence of certain events. Faced with the prospect of losing their investment in the wireless resale market, potential resellers will avoid the wireless market altogether. This will result in less competition, and consumers will ultimately pay the price in the form of fewer service alternatives and higher overall rates and charges. The Commission must deny PCIA's request for forbearance because it is not in the public interest.

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[21] *Id.*

[22] *See PCIA Forbearance Order*, ¶ 42.

III. THE COMMISSION'S DECISION TO DENY PCIA'S PETITION IS JUSTIFIED AND IN ACCORDANCE WITH SECTION 10 OF THE COMMUNICATIONS ACT.

The Commission should reject PCIA's characterization of its decision to maintain the resale rule as "expanding" regulation.[23/] Because the CMRS resale rule is in force, its retention cannot be characterized as an "expansion" of regulation.[24/] In fact, the Commission's *PCIA Forbearance Order* simply provides regulatory guidelines under the preexisting forbearance rules. Maintaining the *status quo* is not expanding the scope of regulation.

Contrary to PCIA's assertions, the standard established by the Commission will make it easier for future petitioners to demonstrate competitive conditions that would support a request for forbearance. Carriers seeking forbearance in the future need only satisfy the Commission's standard to obtain forbearance under the Act. If anything, the Commission *simplified* the standard for forbearance under Section 10 by outlining the specific factors it will examine in determining whether the requirements of Section 10 are met. PCIA objects to the Commission providing this guidance because it realizes that current market conditions do not support the requested relief.

23/ *See PCIA Petition* at 4-5.

24/ PCIA also overestimates the "costs" of resale. *See PCIA Petition* at 15. The Commission has held that the resale rule does not prevent a provider from recovering the costs incurred in providing a service, including the costs of developing any underlying technology, or from inserting in its sales agreements appropriate, non-discriminatory terms to protect its interests. *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Stations, *First Report and Order*, 11 FCC Rcd. 18455, 18472 (1996).

PCIA also argues that the Commission's decision is not supported by the APA because the articulated standards for CMRS resale forbearance are impermissibly vague.[25/] PCIA's APA argument is misguided. The Commission's listing of the competitive market indicators it will consider in future forbearance petitions fully comports with the requirements of the APA.[26/] It is axiomatic that Commission decisionmaking must be "rationally grounded in the evidence before the agency."[27/] The APA requires the Commission to consider standards for judging the competitiveness of a CMRS market. The Commission's standards for judging future CMRS resale forbearance petitions constitute a reasonable method of soliciting relevant market-specific evidence on which to base a decision under Section 10.

Moreover, the Commission has an obligation to adopt and apply a consistent forbearance standard under Section 10 of the Act. The Court of Appeals for the District of Columbia Circuit has held that the Commission must "articulate identifiable standards" that govern its decisions.[28/] By articulating the standard it will use in future petitions to evaluate the competitiveness of a

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[25/] *See PCIA Petition* at 20.

[26/] In its *PCIA Forbearance Order*, the Commission stated that it would rely on market indicators such as, but not limited to, the state of facilities-based competition, the extent of resale activity within a given market, the immediate prospects for future development of additional facilities-based competition and the value of service to previously unserved or underserved markets. *PCIA Forbearance Order*, ¶ 44.

[27/] *See NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982).

[28/] *See, e.g., Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). "We cannot determine whether an agency has acted correctly unless we are told what factors are important and why they are relevant." *Moon v. Department of Labor*, 727 F.2d 1315, 1318 (D.C. Cir. 1984); *Railway Labor Executives Assoc. v. United States Railroad Retirement Board*, 749 F.2d 856, 862 (D.C. Cir. 1984) (vacating an agency's statutory interpretation for failure to articulate and apply a standard).

CMRS market, the Commission is meeting its obligation to adopt and apply a consistent forbearance standard.

IV. THE COMMUNICATIONS ACT DOES NOT PERMIT "AUTOMATIC FORBEARANCE."

After having failed to convince the Commission that the CMRS market as a whole is sufficiently competitive to warrant forbearance from the resale requirements, PCIA requests that the Commission institute "automatic forbearance" to be triggered by the presence of at least four operators serving the public in a particular market.[29/] PCIA's request is contrary to the procedure required by Section 10 of the Act. Nowhere in the legislative history of Section 10 is there any support for this type of summary forbearance. Section 10 provides that forbearance is appropriate if the Commission "*determines*" that competitive market conditions are present.[30/] The Commission has correctly decided that Section 10 requires that the Commission perform an analysis of competitive market conditions to determine whether forbearance is warranted. Any automatic forbearance proposal would be an abdication of the Commission's obligations under Section 10 by replacing analysis grounded on the record in favor of an arbitrary proxy.

Furthermore, PCIA's postcard demonstration of compliance with the Section 10 requirements is unlikely to withstand appellate scrutiny because it does not meet, or even

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[29/] *See PCIA Petition* at 24. PCIA's "automatic forbearance" proposal overreaches by contending that "a mere notification from one of the carriers in the market would be sufficient" for the Commission to make a finding that forbearance is in the public interest. *Id.*

[30/] 47 U.S.C. § 10(a) (emphasis added).

address, the competitive conditions present in the geographic market at issue.[31/] It would be arbitrary and capricious to rely solely on the fact that four carriers are operating in a given market without a confirmation that these carriers are actually serving customers, that service is ubiquitously available from each of these sources, and that competition is sufficiently robust as to warrant forbearance.[32/] Indeed, PCIA's proposal would seem to allow for forbearance even if the new entrants are serving only a small number of customers and therefore have a relatively small impact on the competitiveness of a particular geographic market.

The Commission has never found that the number of a carriers in a given market is determinative as to whether there is adequate competition. Instead, to the extent the Commission has concluded that a market is competitive, it has based this finding upon a number of different market factors as reflected in the administrative record before it.[33/] There is no precedent nor an administrative record to support a Commission decision that the number of carriers in a market can support a finding of competition sufficient to warrant forbearance. PCIA's automatic

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[31/] *See Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997) (We review FCC decisions "under the arbitrary and capricious review standard to see 'whether the decision was based on a consideration of the relevant factors.'" (*quoting Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[32/] The Commission's experience with the interexchange market is instructive. The Commission found that so few carriers did not justify a ruling finding AT&T to be non-dominant. Given the entrenched status of the incumbents and recent appearance of new entrants forbearance is unjustified in this circumstance as well.

[33/] *See* Motion of AT&T to Be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995) (considering factors such as market share of existing carriers and supply and demand elasticity of demand for long-distance services). In fact, the Commission did not even consider the number of carriers as a factor in deciding whether the interexchange market was sufficiently competitive to warrant reclassification of AT&T as non-dominant. *Id.*

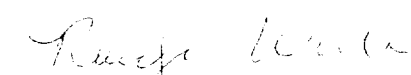
forbearance theory is therefore inconsistent with the language of Section 10, and would constitute an abandonment of reasoned agency decisionmaking.[34/]

V. CONCLUSION

In its *PCIA Forbearance Order*, the Commission recognized that resale plays a critical role in the development of telecommunications markets and benefits the marketplace.[35/] The Commission determined that forbearance from the CMRS resale rule was not appropriate at this time. PCIA fails to make any arguments that warrant reconsideration of that decision. Accordingly, America One respectfully requests that the Commission deny PCIA's petition and affirm its decision to retain the CMRS resale rule.

Respectfully submitted,

AMERICA ONE COMMUNICATIONS, INC.



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[34/] *See Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 n. 74 (D.C. Cir.) (*en banc*), *cert. denied sub nom, E.I. Du Pont de Nemours & Co. v. EPA*, 426 U.S. 941, 96 S.Ct. 2662 (1976).

[35/] *PCIA Forbearance Order*, ¶ 35.

CERTIFICATE OF SERVICE

I, Joslin Arnold, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 15th day of October, 1998, a copy of the foregoing Opposition of America One Communications, Inc. was sent by first-class mail to the following:

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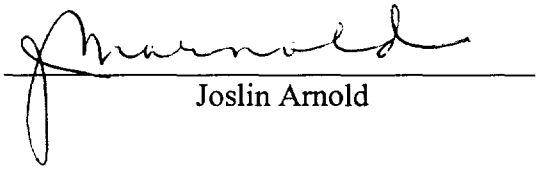

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